IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.516 OF 1992

Fatmabi Shaikh Abbas Qureshi
1311 Bhimpura, Kureshinagar,
Pune. ..Appellant

versus

Abdul Khalid Khidarmiya
Kureshinagar, Pune ..Respondent.

Mr.S.D.Thokade for the Appellant

Mr.G.M.Khambete for the Respondent

Coram : S.R.Sathe, J.
Dated : 31st July, 2006

JUDGMENT.

. Appellant, the original plaintiff in Regular Civil Suit No.1958 of 1984 has preferred this appeal against the judgment and order pased by the Court of 10th Additional District Judge, Pune in Civil Appeal No. 973 of 1989, whereby the appeal was allowed and the order passed by the trial Court decreeing the plaintiff's suit for possession was set aside. For the sake of convenience hereafter the parties shall be referred to as plaintiff and defendant.

2. Brief facts giving rise to this appeal are as under :

. The house property bearing Survey

No.390/2252, Bhimpura, Pune described in detail in paragraph 1 of the plaint is owned by the plaintiff. It was initially owned by one Halimabi. The plaintiff purchased the same by virtue of registered sale deed. According to plaintiff the defendant was never a tenant of plaintiff or plaintiff's predecessor in title. It is plaintiff's case that defendant by making an encroachment in the suit premises started residing therein though he was not having any legal right in that behalf. Not only that, but the defendant without consent of the plaintiff started demolishing the suit property to some extent. Thus, according to plaintiff the defendant was a trespasser in the suit premises. Plaintiff, therefore filed suit for permanent injunction restraining defendant from demolishing the suit property and carrying out any construction in the same and also claimed for declaration that defendant is a trespasser and prayed for possession of the suit premises. The plaintiff also claimed damages at the rate of Rs.200/- per month from the defendant.

4. The defendant filed his written statement at Exhibit 70 and opposed the suit claim. The

defendant contended that the suit property was originally owned by late Halimabi Suleman. The said Halimabi had no issue. According to defendant he was not having knowledge as to who purchased the property from Halimabi. The defendant, therefore, contended that previously Mohammed Shafiq Qureshi, Mohammed Rafiq Qureshi and Shabbir Ahmed had claimed the ownership of the suit property being legal heirs of deceased Halimabi. Not only that, but they filed Civil Suit No.1430 of 1984 in the Court of CJJD, Pune against the defendant for permanent injunction. The defendant further contended that plaintiff has not made it clear as to when and how plaintiff became the owner of the suit property.

5. The defendant further contended that since the time of Halimabi Suleman, the said property is in his occupation as a tenant. The defendant admitted that plaintiff never came forward to treat him as a tenant. According to him he was in fact ready and willing to pay the rent to the landlord. However, plaintiff had never claimed the said rent. The defendant, however, contended that as he is in occupation of the suit property since the time of Halimabi as a tenant, he cannot be treated as a

trespasser and the plaintiff is not entitled to get possession of the suit property. The defendant also contended that the suit property is in dilapidated condition. It was therefore necessary to carry out repairs for the same and as such he obtained necessary permission from Pune Cantonment Board to carry out the repairs. Not only that but he also paid Cantonment taxes of the suit property. Thus, according to the defendant the plaintiff is not entitled to get any relief as claimed. Hence, on all these grounds, the defendant prayed for dismissal of the suit.

6. On these pleadings the learned trial Judge framed issues at Exhibit 23.

7. In order to prove the suit claim, plaintiff examined herself at Exhibit 30 and witness Rajani Kathiraman-Exhibit 48. As against this, the defendant examined himself at Exhibit 50, witness Abdul Qureshi-Exhibit 63 and Balkrishna Penkar, an employee from Cantonment Board at Exhibit 16. Both the parties produced certain documents.

8. After considering the evidence adduced by

both the parties, the learned trial Judge came to the conclusion that plaintiff is the owner of the suit property and defendant is a trespasser. He, therefore, decreed the suit in plaintiff's favour and directed the defendant to hand over the possession of the suit property.

9. Being aggrieved by the said order, the defendant filed Regular Civil Appeal No.973 of 1989. After hearing the arguments advanced by both the learned Advocates, the learned Additional District Judge, Pune, came to the conclusion that defendant is in possession of the suit premises as a tenant and is not a trespasser. He, therefore, allowed the appeal and set aside the order of the learned trial Judge.

10. The above mentioned order of the learned Additional District Judge, Pune is challenged in this Second Appeal by the original plaintiff.

11. From the perusal of the record it is clear that while admitting the appeal, this Court (Coram P.S.Patankar, J.) has passed the following order:

"Admit. Substantial Question of Law is framed in grounds 3 and 4"

The said grounds are as under:

> 3. The substantial question of law would be whether the lower Appellate Court justified in holding that the Respondent-defendant is a tenant, even though there is not a single iota of evidence on record to prove the alleged tenancy of the defendant;
>
> 4. Whether the lower Appellate Court justified in holding that under the provisions of Section 5(11)(c) of the Bombay Rent Act, the Defendant is entitled to claim alleged tenancy by heirship, where as a matter of fact the Defendant's pleading is totally different that he is accepted by the deceased Halimabi and her heirs as tenants and he has paid rent to said Halimabi and her heir Shafi Nanhulal, for which there is no evidence at all;

12. It is not in dispute that the said property was initially owned by one Halimabi. Admittedly, the present plaintiff has purchased the said property by virtue of registered sale deed from the heirs of Halimabi in the year 1984. She has in fact not produced the original registered sale deed of the said property. However, the true copy of the same is produced by her and it is exhibited as Exhibit 31. Thus, plaintiff is the owner of the

suit property is clear from the material on record.

13. The main and the material question is whether the defendant is a trespasser as alleged by the plaintiff. It is needless to say that when the plaintiff says that defendant is a trespasser, then it is expected that the plaintiff should specifically state as to when and how the defendant committed trespass. However, if we peruse the averments in the plaint it is very clear that the same are very vague. It appears that the plaintiff has deliberately avoided to state in the plaint as to when and how the defendant committed trespass. On the contrary, an impression is tried to be created to show that the defendant committed trespass after the plaintiff purchased the property.

14. The defendant has come out with a specific case that the suit property was initially owned by Halimabi. Thereafter one Chandsaheb, the father in law of the present defendant was residing in the suit premises as a tenant of Halimabi and two years after the defendants marriage with the daughter of Chandsaheb he also started residing in the suit premises alongwith his wife and with Chandsaheb.

Admittedly, he continued to stay in the suit premises alongwith his wife i.e. daughter of Chandsaheb even after the death of Chandsaheb. What is pertinent to be noted is that even the plaintiff has admitted that Chandsaheb was residing in the suit premises. A feeble attempt was made on behalf of the plaintiff to show that Chandsaheb was in fact the servant of Halimabi and the suit premises was given to him as he being the servant. So, even if Chandsaheb was residing in the suit premises he had not acquired the status of a tenant and on the contrary it was service tenancy and as such after his death i.e. of Chandsaheb his heirs are not entitled to claim any tenancy in the suit premises. Thus, from this evidence one thing is certain that defendant's entry in the suit premises was certainly not unauthorised or unlawful, nor his action can be treated as an action of a trespasser. On the contrary, it does appear from the material on record that the defendant was residing in the suit premises for a long time i.e. since the lifetime of Chandsaheb and that too at the knowledge of Halimabi. So, under such circumstances, I am inclined to hold that the plaintiff has in fact not come out with clean hands and has tried to suppress

material facts and has only made vague statement that defendant is a trespasser, without giving any details about the alleged trespass.

15. From the perusal of the copy of the sale deed executed by the plaintiffs vendor it is also very clear that defendant is certainly in the suit premises right from the year 1978. In fact, from the defendants evidence it appears that he was there even prior to that. It has also come on record that plaintiffs vendor had in fact filed a suit against the present defendant wherein they had sought injunction against him restraining him from carrying out any construction or demolishing any part of the suit premises. One really does not know why the said suit was further not prosecuted by the present plaintiff after she purchased the property. On the contrary, we find from the record that the said Suit No.1413 of 1984 was in fact withdrawn by the plaintiff's vendor. So, this circumstance is also in favour of the defendant and not of the plaintiff.

16. It appears from the record that the suit property was initially occupied by Chandsaheb and thereafter by the present defendant. So it was very

easy for the plaintiff to adduce cogent evidence to show in what capacity Chandsaheb and thereafter the defendant was occupying the suit premises. For that purpose he could have brought the necessary record from the Cantonment Board wherein after a particular period regularly survey is done and the names of the occupants of the property and their relation with landlord is shown. But, no such attempt to produce best evidence has been made by the plaintiff, but the plaintiff has simply chosen to make baseless statements. It is pertinent to note that the defendant has in fact made a regular application to the Cantonment for seeking permission to carry out necessary repairs to the suit premises. So, under these circumstances, it is really very difficult to believe that the defendant is a trespasser. The plaintiff has certainly failed to adduce any evidence worth the name to show that defendant is a trespasser. On the contrary, considering the material on record and preponderance of probabilities it does appear that the defendant has acquired tenancy right as at the relevant time he was residing with the original tenant Chandsaheb. In view of the above, I think that the first appellate court has considered the entire evidence

in its proper perspective and has rightly set aside the decree passed in favour of the plaintiff.

. In this view of the matter, there is not substance in the appeal. The appeal is dismissed with costs.

(S.R.Sathe, J.)

Date:

To

The Commissioner of Police,
Mumbai City, Mumbai.

Sir,

Sub: Amendment to the premises license issued to Shri Fatehbahadur R. Singh of Triveni Restaurant & Bar, Chembur, Mumbai.

. We are concerned for our client Shri

Fatehbahadur R. Singh of Triveni Restaurant & Bar, ho had made an application for carrying out the amendment in the premises license issued by your office for including the performance of Orchestra on the said license. Alongwith the said application, all the required documents including the letter issued by the Assistant Commissioner of Police, Chembur Division, granting the instalment for the payment of performance fees is annexed. Our client has also annexed the proof/receipt having paid the amount as per the istalment order. Our client is enclosing herewith the receipt dated 4.8.2006 issued by the office of the Assistant Commissioner of Police, Chember Division, accepting the performance license fees of Rs.1,00,000/-. The said payment is made as per the instalment order granted by the said Assistant Commissioner of Police.

. Kindly amend the said premises license as per the application made by our client.

Yours

Advocate